PP

v.

ONG KIA CHAN

HIGH COURT MALAYA, MELAKA
LOW HOP BING J
[CRIMINAL APPEAL NO: 41-1-2003]
16 JUNE 2006

CRIMINAL PROCEDURE: *Charge - Defective charge - Dangerous driving - Incorrect citation of year of Act in charge - Description of offence not in words employed in section - Whether only minor defect - Whether curable - Criminal Procedure Code, ss. 152, 154, 422 - Road Transport Act 1987, s. 41(1)*

ROAD TRAFFIC: *Dangerous driving - Causing death by dangerous driving - Ingredients of offence - Schoolbus colliding into school girl - Whether act of dangerous driving not proved - Whether acquittal by lower court justified - Road Transport Act 1987, s. 41(1) - Road Traffic Ordinance 1958, s. 34A*

The accused was charged with an offence under s. 41(1) of the "Road Transport Act 1987 (Amendment) 2000" ('the Amended Act') for driving "in a manner which endangers without having regard to the condition and amount of traffic, thereby causing the death of Nur Najirah binti Ambrah". The accused, a schoolbus driver, had parked his bus near a school in order to fetch and ferry school children from the school. However, while other school children were boarding the bus, the deceased stopped in front of the bus, squatted herself and attended to her shoe laces. Before the deceased could get up, the accused however mobilised his bus and collided into the deceased. The learned magistrate, upon the facts, and especially upon the unchallenged evidence that the accused was driving slowly, and had confirmed with a passenger that there were was no other students on the road before manoeuvring the bus, acquitted and discharged the accused at the end of the defence case. The prosecution contended that the magistrate had erred in holding that the accused had raised a reasonable doubt in the prosecution's case, and had thus appealed against the decision. Before the learned judge, two issues were raised and dealt with, namely: (i) whether the charge was defective, and if so whether it was curable or otherwise; and (ii)

whether upon a maximum evaluation of the evidence at the close of the defence case, the prosecution has established a case of dangerous driving beyond reasonable doubt.

Held (dismissing the appeal):

(1) In relation to the charge, the prosecution had erred in stating that the Amended Act was effected in 2000 when there was no such amendment. The amendment, as was conceded by the prosecution, was effected in 1999. Another defect was in the use of the words "membahayakan" (endangers) and "tanpa mengambil kira" (without having regard) as opposed to the words "adalah merbahaya kepada awam" (dangerous to the public) and "setelah mengambil perhatian" (having regard) found in s. 41(1) of the Amended Act. However, the defects were not so substantial as to mislead the accused in his defence and were therefore curable under s. 422(a) Criminal Procedure Code. (paras 8, 9 & 17)

(2) To prove dangerous driving, the prosecution must establish: (a) a dangerous situation was created by the accused; and (b) when creating such a situation the accused was at fault. Fault involves a failure, namely a falling below the care and skill of a competent driver and experienced driver in relation to the manner of driving and the relevant circumstances *(Ramiah v. PP)*. Further, the expression "driving in a manner which is dangerous to the public" indicates some dangerous act or manoeuvre on the part of the driver e.g. overtaking a vehicle on the wrong side of the road, overtaking in the face of oncoming traffic or crossing a junction against traffic light and so on. In short, there must be some positive act on the part of the driver which is dangerous having regard to all the circumstances *(Lim Chin Poh v. PP)*. (para 20)

(3) The prosecution has not adduced sufficient evidence to satisfy the test as set out in *Ramiah v. PP* or in *Lim Chin Poh v. PP*. Therefore the learned magistrate, quite correctly, has found the accused not guilty of the offence of dangerous driving. (paras 43 & 44)

Case(s) referred to:

Abdul Hamid Udin v. PP [2000] 6 MLJ 334 ***(refd)***
Balachandran v. PP [2005] 1 CLJ 85 FC ***(refd)***
Chan Chong v. PP [1957] 23 MLJ 246 ***(refd)***
Lau Lim Peng v. PP [1968] 2 MLJ 14 ***(refd)***
Lee Chiang Seng & Ors v. PP [1967] 2 MLJ 32 ***(refd)***
Lim Chin Poh v. PP [1969] 2 MLJ 159 ***(refd)***
Looi Kow Chai & Anor v. PP [2003] 1 CLJ 734 CA ***(refd)***
Mat v. PP [1963] 29 MLJ 263 ***(refd)***
Murugiah v. PP [1941] 10 MLJ 17 HC ***(refd)***
PP v. Cheong Kam [1946] 12 MLJ 12 ***(refd)***
PP v. Lee Hong Kee [1969] 2 MLJ 60 ***(refd)***
PP v. Lee Pak [1937] MLJ 265 ***(refd)***
PP v. LKI Holidays Leisure Sdn Bhd [1997] 3 CLJ 739 HC ***(refd)***
PP v. Low Yong Ping [1961] 27 MLJ 306 ***(refd)***
PP v. Mohd Radzi Abu Bakar [2006] 6 CLJ 457 HC ***(refd)***
PP v. Syed Bakri [1955] MLJ xvii ***(refd)***
Ramiah v. PP [1972] 2 MLJ 258 ***(refd)***
Tan Seow Pong & Ors v. PP [1988] 2 MLJ 563 HC ***(refd)***
Tan Thang Sang v. PP [1975] 1 MLJ 204 HC ***(refd)***
Tay Leong Siak v. PP [2002] MLJU 197 HC ***(refd)***
Wong Ah Kee v. PP [1949] 15 MLJ 68 ***(refd)***
Wong Poh Ching v. PP [1957] 23 MLJ 158 HC ***(refd)***

Legislation referred to:

Criminal Procedure Code, ss. 152(1), (2), (4), 153, 154
Motor Vehicles Enactment (Cap 168), s. 45(iv)
Road Transport Act 1987, ss. 41(1), 422
Road Traffic Ordinance 1958, s. 34A

Road Traffic Ordinance 1961 [Sing], s. 50

For the prosecution - Shazreen Mohd Hattan; DPP
For the respondent - LK Tiu; M/s Koh Kim Leng & Co

[Editor's Note: Whilst the Road Transport Act 1987 was amended in 1999 vide Act A1065, and therefore should rightly be cited as "Road Transport (Amendment) Act 1999", s. 7 of the amending Act, which amended the old s. 41, only came into force on 18 April 2000. For details, please advert to {PU(B) 94/2000}]

Reported by WA Sharif

JUDGMENT

Low Hop Bing J:

Appeal

[1] This is an appeal by the learned public prosecutor against the decision of the learned magistrate ("the magistrate") who had on 24 December 2002, at the close of the defence case, acquitted and discharged the respondent (the accused) of the amended charge under s. 41(1) of the Road Transport Act 1987.

The Charge As Amended

> Bahawa kamu pada 11-05-2000, jam 1.10 petang, di Jalan Penghulu Abbas, Bukit Baru, di dalam daerah Melaka Tengah, di dalam Negeri Melaka, sebagai pemandu m/bas, No. pendaftaran WBX 1029, telah memandu kenderaan tersebut di atas jalanraya dengan cara yang **membahayakan tanpa mengambil kira** keadaan dan kesesakan lalu lintas, sehingga menyebabkan kematian kepada Nur Najirah binti Ambrah, KP No. 861106-30-5238. Oleh yang demikian, kamu telah melakukan satu kesalahan dan boleh dihukum dibawah seksyen 41(1) Akta Pengangkutan Jalan 1987 **(Pindaan) 2000**. (emphasis added)
>
> [My translation:
>
> That you on 11 May 2000, at 1.10pm, Jalan Penghulu Abbas, Bukit Baru, in the district of Melaka Tengah, in the state of Melaka, as a driver of a motor bus, registration No. WBX 1029, did drive the said vehicle on the road in a manner which endangers without having regard to the condition and amount of traffic, thereby causing the death of Nur Najirah binti Ambrah, NRIC No. 861106-30-5238 and that you have thereby committed an offence punishable under s. 41(1) of the Road Transport Act 1987 (Amendment) 2000.] (emphasis added)

[2] The relevant portion of s. 41(1) reads as follows:

> **Bahasa Malaysia**
>
> **41. Menyebabkan kematian kerana memandu dengan ... membahayakan**
>
> (1) Mana-mana orang yang memandu suatu kenderaan motor dijalan ... dengan cara yang, setelah mengambil perhatian tentang segala hal keadaan (termasuk jenis, keadaan dan saiz jalan, dan

kesesakan lalulintas yang dijangkakan yang ada atau mungkin ada di jalan itu) adalah merbahaya kepada orang awam, menyebabkan kematian mana-mana orang, adalah melakukan suatu kesalahan dan ... (emphasis added)

In English

41. Causing death by ... dangerous driving.

(1) Any person who, by the driving of a motor vehicle on a road ... in a manner which having regard to all the circumstances (including the nature, condition and size of the road, and the amount of traffic which is or might be expected to be on the road) is dangerous to the public, causes the death of any person shall be guilty of an offence and ... (emphasis added)

[3] In the course of hearing this appeal, I noted that the amended charge may be defective in two areas *viz* the year the Road Transport Act 1987 was amended and the amended charge did not use the words contained in s. 41(1). I therefore requested both the learned deputy public prosecutor and defence counsel to advise me accordingly on the defects found in the charge.

[4] Learned deputy public prosecutor, Miss Shazreen binti Mohd Hatta while conceding the existence of the aforesaid two defects nevertheless submitted that the errors and omissions in the amended charge have neither misled nor prejudiced the respondent. She relied on *Public Prosecutor v. Lee Pak* [1937] MLJ 265 and ss. 152 to 154 of the Criminal Procedure Code, adding that the defects were merely irregular and not illegal, in which case ss. 156 and 422 would apply. Support was sought in *Abdul Hamid bin Udin v. Public Prosecutor* [2000] 6 MLJ 334 HC; *Public Prosecutor v. Lee Hong Kee* [1969] 2 MLJ 60 HC; *Lee Chiang Seng & 9 Ors. v. Public Prosecutor* [1967] 2 MLJ 32 HC; *Wong Ah Kee v. Public Prosecutor* [1949] 15 MLJ 68 HC; *Tan Seow Pong & Ors. v. Public Prosecutor* [1988] 2 MLJ 563 HC; and *Wong Poh Ching v. Public Prosecutor* [1957] 23 MLJ 158 HC.

[5] A reference hereinafter to a section is a reference to that section in the Criminal Procedure Code unless otherwise stated.

[6] Mr LK Tiu learned defence counsel who had not raised the defects in the court below nevertheless contended that the amended charge had been badly framed and was not curable under s. 422, as the 1987 Act was not amended in 2000 and that the words in s. 41(1) were not followed, as a result of which

A the accused was misled, relying on s. 154; *Lee Pak, supra, Chan Chong v. Public Prosecutor* [1957] 23 MLJ 246; *Public Prosecutor v. Syed Bakri* [1955] MLJ xvii; *Tay Leong Siak v. Public Prosecutor* [2002] MLJU 197 HC; and *Public Prosecutor v. LKI Holidays Leisure Sdn Bhd* [1997] 3 CLJ 739 HC.

B

[7] In the light of the above submissions relating to the charge in question, it becomes necessary for me to reaffirm the relevant principles governing the drafting of a charge under the Criminal Procedure Code, as follows:

C

1. Every charge shall state the offence with which the accused is charged: s. 152(i);

2. If the law which creates the offence gives it any specific name the offence may be described in the charge by that name
D only: s. 152(ii); otherwise, so much of the definition of the offence must be stated as to give notice of the matter with which he is charged: s. 152(iii); *Syed Bakri, supra; Chan Chong, supra; Tay Leong Siak, supra,* and *LKI Holidays Leisure, supra;*

E 3. The law and section thereof against which the offence is said to have been committed shall be mentioned in the charge: s. 152(iv);

4. The charge shall contain such particulars as to the time and
F place of the alleged offence and the person, if any, against whom or the thing, if any, in respect of which it was committed as are reasonably sufficient to give the accused notice of the matter with which he is charged: s. 153(i);

5. When the nature of the case is such that the particulars
G mentioned in ss. 152 and 153 above do not give the accused sufficient notice of the matter with which he is charged, the charge shall also contain such particulars of the manner in which the alleged offence was committed as will be sufficient for that purpose: s. 154;

H

6. No error in stating either the offence or the particulars required to be stated in the charge, and no omission to state the offence or those particulars shall be regarded, at any stage of the case as material unless the accused was in fact misled
I by such error or omission: s. 156; and

7. Any court may alter or add to any charge at any time before judgment is pronounced (s. 158(i)) and such alteration or addition shall be read and explained to the accused: s. 158(ii). A

[8] In relation to the charge in question, the prosecution had erred in stating that the amendment to the 1987 Act was effected in 2000 when there was no such amendment. The prosecution conceded that the amendment was effected in 1999. B

[9] The next defect in the charge was in the use of the word "membahayakan" ("endangers") and "tanpa mengambil kira" ("without having regard") as opposed to the words "adalah merbahaya kepada awam" ("dangerous to the public") and "having regard" respectively provided for in s. 41(1). C

[10] The above defects seem to contravene s. 152(1), (2), (4); and s. 154. D

[11] In *Lee Pak, supra,* there were several defects on the face of the charge under s. 45(iv) of the then Motor Vehicles Enactment (Cap. 168). Whitley Ag CJ observed at p. 353 that the charge should show the accused with particularity the case which he has to meet, and should not leave him guessing as to which of a variety of alternatives he is alleged to have offended against; and that it is desirable that before the charge is put to the accused the magistrate should satisfy himself as to whether in his opinion it is on the face of it properly framed. E F

[12] In the instant appeal, as it had never been suggested in the court below that the defects (arising from errors in the year the amendment came into force and the wording) had in any way misled the accused, I am of the view that they are covered by s. 156, as alluded to in principle 6 above. G

[13] Where the accused had been correctly charged with the offence of possession of cannabis under the Dangerous Drugs Act 1952 but there was an error in stating the wrong section number, Abdul Wahab J held that the accused had not been misled in his defence. H

[14] No miscarriage of justice would result from a technically incorrect charge where the accused had not been misled: per Chang Min Tat J (later FJ) at p. 61G left column in *Lee Hong Kee, supra.* I

[15] Similarly, where the ingredients of the particular offence under s. 50 of the Singapore Road Traffic Ordinance 1961 have been clearly set out, any mistake in referring to the section was held to be not so defective: per Winslow J in *Lee Chiang Seng, supra*.

[16] The omission of the word "knowingly" in a charge under s. 13(i) of the then Excise Enactment which had not embarrassed the accused was held to be curable under s. 422: per Evans J in *Wong Ah Kee, supra*. (See also *Tan Seow Peng & Ors, supra,* per Chan Seck Keong JC (now CJ Singapore) at p. 567; and *Wong Poh Ching, supra,* per Thomson J at p. 160).

[17] The question that needs to be addressed herein is: whether given the aforesaid defects in the charge (which should have been detected by the prosecuting officer or the defence counsel as officers of the court below, and/or the learned magistrate), can the accused be said to have been misled in his defence? I am of the view that the aforesaid defects are not so substantial as to result in the accused being misled in his defence which had been conducted without any hitch. These are minor defects which may be cured under s. 422(a) which where relevant reads:

> ... no finding ... or order passed or made by a court of competent jurisdiction shall be reversed or altered on account of:
>
> (a) any error, omission or irregularity in the ... charge ... under this Code;
>
> (b) ... unless such error, omission, irregularity, ... has occasioned a failure of justice.

[18] Having disposed of the issue arising from the defects in the charge, I shall now consider the appeal on its merits.

Ingredients Of The Charge

[19] The precursor of the offence of causing death by dangerous driving under s. 41(1) was s. 34A of the Road Traffic Ordinance 1958. Hence judgments in which s. 34A had been considered would remain immensely important and useful.

[20] As the appeal concerns issues which are of enormous importance to the magistrates hearing such cases, it is appropriate for me to set out the relevant principles governing "dangerous driving", as follows:

1. In a case of dangerous driving, the prosecution must establish that:

   (a) a situation created by the accused is dangerous eg, turning right into the side road without stopping to give way to through traffic; and

   (b) when creating such a situation the accused was at fault. Fault involves a failure; a falling below the care and skill of a competent and experienced driver in relation to the manner of driving and the relevant circumstances (per Raja Azlan Shah J (now HRH the Sultan of Perak) in *Ramiah v. Public Prosecutor* [1972] 2 MLJ 258 at pp. 258I right column to 259C left column.

2. The expression "driving in a manner which is dangerous to the public" indicates some dangerous act or manoevre on the part of the driver of a vehicle eg, overtaking a vehicle on the wrong side of it, or overtaking in the face of oncoming traffic, or overtaking when unable to see oncoming traffic, or crossing a junction against traffic light, and so on. There must be some positive act on the part of the driver which is dangerous having regard to all the circumstances (per Choor Singh J (Singapore) in *Lim Chin Poh v. Public Prosecutor* [1969] 2 MLJ 159 at p. 161F to I right column.

3. It is impossible to define "dangerous driving" and the legislature has quite rightly not attempted to do so. Driving can become dangerous in an infinite variety of circumstances, one of which is leaving one's own proper side of the road and getting into the path of an oncoming vehicle. Such an act has potentially fatal consequences in the vast majority of cases, and there can be no two views about it being "dangerous": per Ong J (later CJ(M)) in *Public Prosecutor v. Low Yong Ping* [1961] 27 MLJ 306 at p. 307 at column;

4. In the absence of any explanation to the contrary, a driver who drives a vehicle in a speed limit area at such a speed and in such a manner as to be unable to avoid overturning at a bend which is known to be dangerous, and running from behind into another vehicle, is guilty of driving in a manner which is dangerous to the public: per Chang Min Tat J (later FJ) in *Lau Lim Peng v. Public Prosecutor* [1968] 2 MLJ 14 at pp. 14I right column to 15A left column;

5. To overtake a cyclist who is far from steady at the moment when a heavy lorry is approaching from the opposite direction is to take an unjustifiable risk and constitutes dangerous driving: *Public Prosecutor v. Cheong Kam* [1946] 12 MLJ 12.

Finding Of Facts

[21] The judgment of Gopal Sri Ram JCA delivered for the Court of Appeal in *Looi Kow Chai & Anor v. PP* [2003] 1 CLJ 734 clarified that the duty of a judge sitting alone (in this case, the magistrate) is to determine at the close of the prosecution's case as a trier of fact whether the prosecution has made out a *prima facie* case and that he must subject the prosecution evidence to maximum evaluation. This test was affirmed by the Federal Court in a judgment delivered by the same learned judge in *PP v. Mohd Radzi bin Abu Bakar* [2006] 6 CLJ 457. (See also *Balachandran v. PP* [2005] 1 CLJ 85 at pp 99 and 100 per Augustine Paul JCA (now FCJ) delivering the judgment for the Federal Court.

[22] The magistrate's finding of facts may be unfolded as follows:

[23] On 11 May 2000, SP1 a lance corporal was on duty at the enquiry office of the Melaka Tengah police traffic branch when the accused lodged a road accident report No. 3588/2000 with him stating that his school bus had collided with a pupil underneath his bus. Subsequently, the pupil passed away at 3.50am on 12 May 2000.

[24] SP1 then informed the assistant investigating officer (SP2) of the accident. At 4.10pm 11 May 2000 SP2 together with a police photographer SP6, proceeded to and arrived at 4.35pm at the scene where he found the bus had been removed from its scene, Jalan Penghulu Abbas which was a straight road sloping towards the main road, near St. David's School. SP2 found scratches and strands of hair there. The weather was fine and

dry. SP2 met the accused there. SP2 prepared a sketch plan together with a key and directed SP6 to take three photographs at the scene. SP2 found no traces of blood or brake.

[25] At 8.45am 12 May 2000, SP2 proceeded to the hospital mortuary where he met the pupil's father SP3 and the doctor conducting the post-mortem, after SP3 had identified the pupil's body. SP2 directed SP6 to take two photographs of the body.

[26] Upon being informed of the death of the pupil, SP2 handed the case over to Inspector Razaleigh.

[27] Cross-examination of SP2 revealed that the road is a two-way traffic, 3.50 metres wide, accessible to motor buses, and that the accused's bus was at the material time moving slowly, which SP2 agreed was not dangerous. He reaffirmed this under re-examination.

[28] The evidence of SP3 who was at home at the time of the accident did not relate to the manner in which the accident had occurred.

[29] SP4 who was at the scene at the material time had parked his Perodua Kancil car by the side of the road facing the main road. He waited in his car. There were many other waiting cars and motor cycles. He saw the accused's school bus ascending the steep slope from the main road, made a U-turn to face the main road, and parked about 20 feet in front of SP4's car. The accused then alighted from his bus without switching off its engine. After five to six minutes, 50 to 60 school children were seen proceeding to their respective vehicles. The road was crowded and the vehicles could not move fast.

[30] SP4 saw the pupil adjusting her shoe laces by the side of the road about eight feet in front of the accused's bus, which then knocked the pupil, the point of impact being on the left of the bus. SP4 shouted to the accused, asking the accused to alight from his bus so as to see the pupil underneath, and the accused did. With the assistance of other female students, SP4 sent the pupil to the Melaka Hospital.

[31] Under cross-examination, SP4 confirmed that the accused was driving slowly, engaging the first gear. When re-examined SP4 also confirmed that the pupil was in a squatting position when the bus knocked her.

[32] The post-mortem report served by SP5 on the accused confirmed that the pupil died of severe injuries arising from a motor vehicle accident.

[33] At the close of the prosecution's case, the magistrate found that the prosecution has established a *prima facie* case for the accused to answer.

[34] The accused's evidence on oath revealed that he had been a bus driver for 22 years during which he had an unblemished driving record.

[35] On the day and at the time in question, he was in his bus at St David's School where he had been transporting school children for about 10 years and so was familiar with the conditions on the road. He had parked his bus on a slightly steep slope, by the side of a drain and his bus was facing Bukit Baru. One of his passengers was Chan Yit Sang (SD2). Before the accused drove his bus at 1.15pm, he looked to the front, left and right and asked his passengers sitting on the left row of his bus whether there were other students on the road. He mobilised his bus only upon confirmation that it was safe to do so. The road was not congested as there were not many students then. However, when he moved his bus forward, he felt his bus had collided with something, at the gradient of 10°. He did not see anything ahead of his bus and had engaged the first gear, moving at about 5 kmph.

[36] Upon the collision, the accused stopped his bus and alighted to see the pupil under the wheel on the left front portion of the bus. He found the impact was on the waist of the pupil, whom he first carried to his bus, until SP4 took the pupil to the Hospital. He testified that had he been aware of the presence of the pupil, he would not have mobilised his bus.

[37] The accused confirmed under cross-examination that SD2 was sitting on the first front seat on the left row of the bus.

[38] SD2 is a fifth former in the school. On the day in question, he was in the left front seat of the accused's bus, from where SD2 was able to see if there were school children on the left of the bus. When the road was clear, SD2 informed the accused who also made an observation of the left, right, front and rear of the bus, before driving his bus, slowly. He was not overtaking any other vehicle.

[39] The magistrate accepted the evidence of the accused and SD2, as having created a reasonable doubt and so acquitted and discharged the accused at the close of the defence case.

Defence Case

[40] Learned deputy public prosecutor submitted that the magistrate had erred in holding that the accused had raised a reasonable doubt in the prosecution's case and relied on *Public Prosecutor v. Low Yong Ping, supra; Lau Lim Peng v. Public Prosecutor, supra; and Ramiah v. Public Prosecutor, supra.*

[41] Learned defence counsel contended that the magistrate had the opportunity of hearing the witnesses and observing their demeanour and had arrived at a correct decision. The following authorities were cited:

1. *Murugiah v. Public Prosecutor* [1941] 10 MLJ 17 HC;
2. *Mat v. Public Prosecutor* [1963] 29 MLJ 263;
3. *Lim Chin Poh v Public Prosecutor, supra;* and
4. *Tan Thang Sang v Public Prosecutor* [1975] 1 MLJ 204 HC.

[42] The issue that calls for determination in this appeal is whether, upon a maximum evaluation of the evidence at the close of the defence case, the prosecution has succeeded in establishing a case of dangerous driving beyond reasonable doubt or it has been rebutted by the defence case.

[43] It appears to me that throughout the entire proceedings, the prosecution has focused on the case of dangerous driving against the accused. On the above finding of facts, it is difficult to see how the prosecution has adduced sufficient evidence to satisfy the test as set out in *Ramiah, supra,* or in *Lim Chin Poh, supra.*

[44] The magistrate has therefore correctly found the accused not guilty of the offence of dangerous driving at the close of the defence case.

[45] In the circumstances, I affirm the order of acquittal and discharge, with the result that this appeal is hereby dismissed.